## Appendix 1

San Ramon Valley Unified School District
20 Cal.App.4th 1054; — Cal.Rptr.2d — [Dec. 1993]

VERN WEBER,
Plaintiff and Appellant,

v.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT et al.,
Defendants and Appellants.

### SUMMARY

In an action for legal and equitable relief based on the termination of plaintiff's employment as a senior manager of a school district, alleging deprivation of civil rights under 42 U.S.C. § 1983 and wrongful termination under Ed. Code § 45117 and 45308, the trial court awarded plianitff compensatory and punitive damages and attorney fees. Plaintiff had been terminated after making certain statements to the press. (Superior Court of Contra Costa County, No. C-90 03341, Jay A. Pfotenhauer, Judge.)

The Court of Appeal reversed the order awarding attorney fees, but affirmed the judgment in all other respects. The court held that the school district's elimination of plaintiff's position for lack of work or funds was merely a pretext, and that although it was error to rule that plaintiff's statements to the press were constitutionally protected, since the statements concerning the circumstances of plaintiff's departure from the school district related only to his individual employee grievance, there was no reasonable probability that this error affected the jury's verdict on the action brought under the Education Code. Under Cal. Const., art. VI, § 13 (test of prejudicial error), a miscarriage of justice should be declared only if it is reasonably probable that a result more

favorable to the appealing party would have been reached in the absence of the error. However, the award of attorney fees under 42 U.S.C. § 1988(b) (fees in actions to enforce 42 U.S.C. § 1983) had to be reversed, since plaintiff would not have prevailed in his action under 42 U.S.C. § 1983 were it not for the erroneous ruling on constitutionally protected speech. (Opinion by Newsom, J., with Strankman, P.J., and Stein, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 55 — first amendment and other fundamental rights of citizens — Freedom of Speech and Expression — Termination of Public Employment for Speech: Public Officers and Employees § 30 — removal from office — Freedom of Speech. — A public employee's exercise of the right to speak on issues of public importance may not furnish the basis for dismissal. Courts should balance the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs. The threshold question of whether the speech was on a matter of public concern is a question of law that may be reviewed de novo on appeal, and must be determined by the content, form, and context of a given statement. Only speech relating to matters of public concern, and not speech voicing grievances about internal office affairs, can give rise to a cause of action under 42 U.S.C. § 1983 for deprivation of civil rights.

(2) Schools § 48 — Teachers and Other Employees — Suspension or Dismissal — Judicial Review — Dismissal as Violating Constitutional Rights: Appellate Review § 184 — Harmless and Reversible Error — Findings of Fact and Conclusions of Law — Constitutionally Protected Speech. — In an action by a senior manager of a school district

brought pursuant to 42 U.S.C. § 1983 (deprivation of civil rights), and Ed. Code, §§ 45117 and 45308 (wrongful termination), the manager was entitled to compensatory and punitive damages under his Education Code claims, where the elimination of his position for lack of work or funds was merely a pretext. Although it was error to rule that the manager's statements to the press were constitutionally protected, where the speech in question related only to an individual employee grievance, there was no reasonable probability that this error affected the jury's verdict on the action brought under the Education Code. Under Cal. Const. art. VI, § 13 (test of prejudicial error), a miscarriage of justice should be declared only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. However, the award of attorney fees under 42 U.S.C. § 1988(b) (fees in actions to enforce 42 U.S.C. § 1983) had to be reversed, since plaintiff would not have prevailed in his action under 42 U.S.C. § 1983 were it not for the erroneous ruling on constitutionally protected speech.

[See 8 *Witkin*, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 708; 9 *Witkin*, Cal. Procedure (3d ed. 1985) Appeal, § 324.]

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COUNSEL

Faust & Roy and Geoffrey M. Faust for Plaintiff and Appellant.
Liebman, Reiner & McNeil and Joseph R. Zamora for Defendants and Appellants.

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OPINION

NEWSON, J. — San Ramon Valley Unified School District (School District), William A. Streshly and James C. O'Connor appeal a judgment in favor of Vern Weber (hereafter Weber) awarding $313,600 in economic damages and

$75,000 for mental and emotional distress. William Streshly also appeals the portion of the judgment awarding Weber $7,500 in punitive damages against him. Both parties have filed notices of appeal from a decision awarding attorney fees in the amount of $177,034.50.

In an original complaint filed July 31, 1990, and a first amended complaint filed nine months later, Weber alleged fifteen causes of action for legal and equitable relief based on the termination of his employment with the School District. The case was, however, submitted to the jury on only two causes of action as a result of orders of summary adjudication and voluntary dismissal. In response to two motions for summary adjudication the trial court dismissed a series of causes of action based on theories of fraud, breach of contract, and punitive damages. At the close of evidence, Weber voluntarily dismissed remaining causes of action for negligent misrepresentation and fraud in the face of a motion for nonsuit. The case was submitted to the jury of two theories: wrongful termination under Education Code sections 45117 and 45308 and violation of civil rights under 42 United States Code section 1983.

The jury returned a special verdict finding the School District liable on both theories. Addressing the alleged violation of the Education Code, the jury answered "yes" to the question: "Was Plaintiff laid off for reasons other than lack of work or lack of funds?" And "no" to the question: "If your answer to Question 1 is 'Yes', would the School District nevertheless have laid off Plaintiff because of lack of work or lack of funds?" Since the School District never contended that Weber was laid off for cause or poor job performance, the findings compelled the conclusion that he was terminated in violation of the Education Code sections 45117 and 45308. With regard to the claimed violation of civil rights, the jury answers "yes" to the question: "Was the defendants' decision to lay off the plaintiff substantially

motivated by plaintiff's statements on matters of public concern?" And "no" to the question: "Would the defendants have reached the decision to lay off the plaintiff even if he had not made statements on matters of public concern?"

The facts may be very briefly stated because the disposition of the appeal turns on a narrow issue: whether the First Amendment protects Weber's statement to the press published October 24, 1989. As one of five senior managers of the School District, Weber was a classified employee under the Education Code working on independent contract. He had begun work for the School District in 1973 as a business manager after working some time as an educational consultant. In 1984, his job description was changed to director of management services. His responsibilities included demographic planning, facilities planning, and liaison with the Office of Local Assistance, the agency of the State Department of Education providing funding for local school districts. In 1989, he enjoyed a salary of $75,000 plus benefits. By all accounts, Weber was an outstanding employee with a state-wide reputation in the fields of demographics and facilities planning.

In 1986, appellant William Streshly was appointed superintendant of the School District. He soon began to form his own management team, prompting two senior managers to leave district positions. Weber's own contract expired in June 1989, although he would continue to enjoy job protection as a classified employee. By the time he faced the prospect of renegotiating his contract, Weber had fallen into conflict with Streshly on certain issues. Weber resisted Streshly's use of money from a fund derived from developer's fees for purposes which were not closely related to capital expenditures for new school facilities. In addition, late in 1988, Streshly inflated Weber's projection for student enrollment so as to produce the appearance of a balanced budget in the next school year. In two confidential memo-

randa written late in the year to School District management, Weber predicted that the inflated projection would lead to a substantial deficit for the next school year.

On April 10, 1989, James O'Conor assumed the duties of assistant superintendant — filling a vacancy for which Weber had applied. The superintendant, Streshly, advised him that he would be expected to reorganize the business functions of the School District, including Weber's position. On his second day on the job, O'Connor interviewed Weber concerning four areas of perceived weakness in his job performance. At trial, O'Connor acknowledged that he relied on Streshly for his information about these alleged shortcomings. In May, O'Connor talked to Weber about the option of applying for a newly created position offering a substantially lower salary. He told Weber that the District needed his skills in demographics and facilities planning but desired these services at a lower cost. About this time, O'Connor testified that he began talking to Weber about the possibility that Weber could continue to work for the School District on a parttime basis as a consultant. Other top officials testified that, as the expiration date of Weber's contract approached, they discussed in a "cabinet" meeting of top officials the desirability of eliminating Weber's position while retaining his invaluable expertise as a consultant.

For his part, Weber points out that he was on a list of management employees for the next year which the school board approved on June 20, 1989. He claims that the administration first asked him to resign on June 28, 1989, the day after he was interviewed by a local newspaper reporter. Late in the afternoon of that day, Weber was summoned into Streshly's office to answer questions of Kay Hwangbo, a reporter for the San Ramon Valley Times. Hwangbo was questioning Streshly about the inflation of student enrollment fugures for the 1988-89 school year. Although Streshly acknowledged he had deliberately in-

flated the staff estimate, Hwangbo wanted to pursue the point. Streshly testified it was his normal practice to transfer a reporter to staff members with specific expertise in the topic under discussion. Weber himself was frequently quoted in the press.

When Weber entered the room he found Streshly talking to the reporter on a speaker phone. Streshly told Weber to "give her what she needed" and suggested that he could pick up the receiver for a one-on-one conversation. Weber talked to Hwangbo for about five minutes on the topic of the inflated student enrollment figures as Streshly and O'Connor stood in another part of the room. He did not know whether they overheard the conversation. Streshly never commented on the way Weber conducted the interview.

The next afternoon, O'Connor asked Weber to resign his position and take a consulting role with the School District. Weber replied that he "would be willing to discuss that" if he were offered "the right terms and conditions. . . ." On June 30, 1989, Hwangbo's article appeared in the San Ramon Valley Times, portraying Weber as a whistle-blower. The headline stated in bold letters "Streshly Cited for Deficit" and continued in lower type: "Facilities director says funds were inflated." The same day O'Connor visited Weber's office and demanded again that he resign. Since Streshly was then out of town, the two men scheduled a meeting for July 6, 1989, after his return.

On July 6, 1989, Weber met for about one and one-half hours with Streshly, O'Connor, and Mike Halloran, the assistant superintendant for personnel. At the conclusion of the meeting, O'Connor briefly summarized on a hand-written note the agreed terms for Weber's resignation: (1) he would remain on the payroll until December 31, 1989, taking 2 months of accrued vacation in November and December; (2) effective January 1, 1990, he would be given

a consulting contract calling for 1,000 hours of work at a rate of $50 per hour; (3) the School District would provide health and welfare benefits until age 70; and (4) the parties would agree on a joint statement regarding his resignation.

The School District attorney, Sandra Wolliver, prepared a draft of the consulting agreement, but Weber strongly objected to a provision saying that "neither party may make any other public statement," apart from the joint statement regarding Weber's retirement from the district, and he insisted on a draft of the agreement that he had written himself without this provision. In September, Streshly and Weber signed an agreed public statement. On October 16, 1989, Streshly signed a formal consulting agreement, promising Weber two years of employment as a consultant on the agreed terms. Weber signed the agreement the next day.

Upon learning of his resignation, Hwangbo interviewed Weber for 20 to 30 minutes by telephone. She testified that he told her "that he was being forced to leave the School District," that he had been asked to sign a document prohibiting him from talking "about his leaving the School District or anything like that," that he was never told "why he was being let go," and that "he was concerned about what would happen with the facilities department . . . [because] there was nobody in the School District that had his particular expertise in that area." An article sympathetic to Weber containing the substance of the interview, was published on October 24, 1989, under the headline "Weber says he was forced from district job." He was quoted in bold print as saying that he had "serious concerns for the welfare of the school district."

On November 1, 1989, Streshly wrote Weber a letter claiming that they had "not yet reached a final agreement regarding [his] separation from the district." Streshly stated, "Several issues which have surfaced, we must discuss them immediately." Among these issues was [Weber's]

recent unilateral statement to the press regarding separation from the district which directly contradicts [his] proposed joint statement." A few days later, Weber received another letter from Streshly stating that the School Board had eliminated his job for "lack of work and/or lack of funds." Retaining an attorney, Weber sought unsuccessfully to renegotiate the consulting agreement. Among other things, the School District objected that the provision regarding a joint statement was "no longer performable" because of his "unilateral public statement about his employment and retirement. . . ." The School District eventually retained another consultant to do the work promised to him. At trial, O'Connor characterized Weber as "a victim" of the October 24, 1989 article.

In the orders granting summary adjudication, which are not challenged in this appeal, this trial court ruled that the consulting agreement signed by Streshly, not having been properly authorized, was therefore unenforceable under the Education Code and that the alleged misrepresentations leading to Weber's resignation were not actionable under Government Code sections 818.8 and 822.2. Nevertheless, the court admitted evidence of the October 24, 1989, article for its relevance to the cause of action for deprivation of civil rights which is premised on the theory that Weber was discharged as retaliation for his exercise of his First Amendment rights. Ruling on a motion *in limine*, the court found that the statement was constitutionally protected. In this appeal, the School District bases its attack on the judgment for damages solely on this constitutional ruling.

Weber brings his cause of action for deprivation of civil rights under 42 United States Code section 1983, invoking the concurrent jurisdiction of state courts in the enforcement of this federal statute. Subject to a qualified immunity which we do not reach here (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L.Ed.2d 396, 410-411, 102 S.Ct.

2727]), the statute creates a cause of action for damages against any state official "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . " the same constitutional standards apply in suits brought against state officials under section 1983 and in suits brought directly under the constitution against federal officials. (*Butz v. Economou* (1978) 438 U.S. 478, 504 [57 L.Ed.2d 895, 914, 98 S.Ct. 2894].)

(1) Since the United States Supreme Court decision in *Pickering v. Board of Education* (1968) 391 U.S. 563, 574 [20 L.Ed.2d 811, 821, 88 S.Ct. 1731], it has been well established that a public employee's exercise of his "'right to speak on issues of public importance'" may not furnish the basis for his dismissal from public employment. (*Havekost v. U.S. Dept. of Navy* (9th Cir. 1991) 925 F.2d 316, 318; see also *Burgess v. Pierce County* (9th Cir. 1990) 918 F.2d; *Barnes v. Small* (D.C. Cir. 1988) 840 F.2d 972, 982 [268 U.S.App.D.C. 265].) The *Pickering* decision directs the courts to balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services, it performs through its employees." (*Pickering v. Board of Education, supra*, 391 U.S. 563, 568 [20 L.Ed.2d 811, 817].) But "the threshold question before applying the balancing test is whether the employee's challenged speech may be 'fairly characterized as constituting speech on a matter of public concern. . . .' " (*Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 643 [283 Cal.Rptr. 610]; *Rankin v. McPherson* (1987) 483 U.S. 378, 384 [97 L.Ed.2d 315, 324, 107 S.2891].) This question of whether "an employee's speech involves a matter of public concern is a question of law" (*Roth v. Veteran's Admin. of Government of U.S.* (9th

Cir. 1988) 856 F.2d 1401, 1405) which may be reviewed de novo on appeal. (*Allen v. Scribner* (9th Cir. 1987) 812 F.2d 426, 430, fn. 8.)

"Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal," the *Pickering* decision did not "attempt to lay down a general standard against which all such statements may be judged" but merely indicated "some of the general lines along which an analysis of the controlling interests should run." (*Pickering v. Board of Education, supra*, 391 U.S. at p. 569 [20 L.Ed.2d at pp. 817-818].) " 'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.' " (*Rankin v. McPherson, supra*, 483 U.S. 378, 3844-3385 [97 L.Ed.2d 315, 324-325].) Pursuing this analysis, the Supreme Court in *Connick v. Myers*, (1983) 461 U.S. 138 [75 L.Ed.2d 708, 103 S.Ct. 1684], distinguishes between speech related to matters of public concern — the focus of the *Pickering* decision — and speech voicing grievances about internal office affairs. Only the former, it held, can give rise to a cause of action under section 1983.

The plaintiff in *Connick*, an assistant district attorney who was transferred to another division of the criminal court, distributed a questionnaire to other assistance district attorneys concerning, among other things, "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, . . ." (461 U.S. at p. 141 [75 L.Ed.2d at p. 716].) This action resulted in her immediate dismissal from her job. The Supreme Court viewed the questions propounded in the questionnaire as "mere extensions of [her] dispute over her transfer to another section of the criminal court." (*Id.* at p. 148 [75 L.Ed.2d at pp. 720-721].) While this dispute was not "totally beyond the

protection of the First Amendment," it did not present a constitutional issue that could be scrutinized by federal courts in action under 42 United States Code section 1983. The court held ". . . that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." (461 U.S. at p. 147 [75 L.Ed.2d at p. 720].)

The court sought to avoid an interpretation of 42 United States Code section 1983 that would "constitutionalize" ordinary employee grievances, adding a federal cause of action to the remedies otherwise existing under state law. The issue is not whether the grievance was well founded; other provisions of law may provide a remedy if the employee's contractual or statutory rights were violated. The narrow issue presented by section 1983 is whether the employee's discharge is barred by the First and Fourteenth Amendments. The constitutional standard, protected by section 1983, bars discharge only when the employer retaliates against the exercise of speech on "public issues," which occupies "the highest rung of the hierarchy of First Amendment values" and is entitled to special protection." (461 U.S. at p. 145 [75 L.Ed.2d at pp. 718-719].) In contrast, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." (*Id.* at p. 146 [75 L.Ed.2d at p. 719].)

(2) While ruling that the October 24, 1989, statement was constitutionally protected, the trial court commented that it presented a "borderline situation." We agree that the

issue is close, but conclude that the statement does not fall into the category of statements protected by section 1983. Weber's statements concerning the circumstances of his departure from the school district clearly relate to an individual employee grievance, i.e., that he was forced out of the position without an explanation and asked to sign a "gag" document preventing public comment. The more difficult question relates to his expressed concern for the welfare of the school district. On its face, this statement might seem to involve a matter of public concern. But in actual context, Weber's concern for the district welfare was a "mere extension" of his individual grievance. His concern was directed at the consequence of his discharge on the management of district affairs; the detriment to district welfare lay in the loss of his own expertise. The expressed concern did not go beyond the subject of his own individual grievance — the loss of his job — and therefore did not concern a matter of public concern as defined in the *Connick* decision. (See *Allen v. Scribner, supra*, F.2d 426, 4312; *Murray v. Gardner* (D.C. Cir. 1984) 741 F.2d 434, 438 [239 U.S.App.D.C. 212]; *McKinley v. City of Eloy* (9th Cir. 1983) 705 F.2d 1110, 1114; *Chico Police Officers' Assn. v. City of Chico, supra*, 232 Cal.App.3d 635, 644.)

We now address the perplexing question of the implications of the error for disposition of the case on appeal. Under California Constitution, article VI, section 13, the test of prejudicial error "may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

Under this standard, we do not see any reasonable probability that the error affected the jury's verdict on the

action brought under the Education Code. The evidence had no logical connection with the issues presented by this legal theory, and Weber's case was very strong. An abundance of evidence tended to prove that the School District's elimination of Weber's position for "lack of work and/or funds" was merely a pretext adopted after the fact. Without question, he was an exceptionally effective and productive employee. After his discharge, the School District attempted to replace his contribution by delegating tasks to several employees with less than complete success. James O'Connor acknowledged that it took the equivalent of two and one-half employee positions to perform the work that Weber was doing. Although the School District was under financial pressure, Weber's position was funded by a developer's fund, devoted to capital improvements, that was under less financial pressure than the general fund. A series of witnesses testified that lack of work or funds was in fact never mentioned in connection with Weber's discharge.

Similarly, we do not think it reasonably probable that the error affected the award of punitive damages against William Streshly. The claim for punitive damages was based on a lengthy course of conduct, beginning with Weber's opposition to Streshly's policies, that was relevant to both causes of action.

But apart from the October 24, 1989, article, the cause of action for deprivation of civil rights was based on rather tenuous inferences drawn from the succession of events. In testimony strongly disputed by other School District officials, Weber said that he was first given an ultimatum to resign the day after he gave the interview for this article. The testimony was strongly disputed by other School District officials, but it gained plausibility in light of the school district's response to the October 24, 1989 publication, Streshly explicitly raised the October 24, 1989 article as an obstacle to the proposed consulting contract and ultimately

reneged on his promise to secure the contract. While the denial of this proposed arrangement was not actionable, it gave credibility to Weber's claim that Streshly had also sought his resignation because of his earlier disclosure to the press. Weber's counsel linked the two incidents in a compelling argument to the jury: "If October 24th costs Mr. Weber his consulting agreement, it's a little difficult to believe that the June 30th article wouldn't have cost him his job."

We find that, in the absence of the court's erroneous ruling extending constitutional protection to the October 24, 1989 statement, it is reasonably probable that the jury would have reached a result more favorable to the School District on the civil rights cause of action. This conclusion, however, does not affect the judgment for compensatory damages. The theory of deprivation of civil rights was one of two alternative theories of liability supporting the same elements of damages. The error only calls into question the validity of the award of attorney fees.

The court awarded attorney fees under the authority of 42 United States Code section 1988(b) which provides in relevant part: "In any action or proceeding to enforce a provision of sections . . . 1983 . . . [of this] title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The statute has no counterpart in the Education Code.

We are forced to conclude that Weber did not prevail in his action under 42 United States Code section 1983 because, to the extent that it was based on this theory of liability, the judgment is subject to reversal for prejudicial error. We recognize some possible unfairness in this result. Since the facts underlying the June 30, 1989 article (as opposed to that of October 24th) might have supported an inference allowing the case to go to the jury could have upheld this theory of liability in any event. But we cannot

remand the case for a new trial simply in order to determine Weber's right to attorney fees on the first trial; and, as the case reaches us in this appeal, the action under 42 United States Code section 1983 has proved to be inconclusive.

The order awarding jury fees filed December 18, 1991, is reversed. In all other respects the judgment is affirmed. Costs to the School District.

Strankman, P.J., and Stein, J., concurred.

**Appendix 2**

First Appellate District,
Division One

No. A055893

S037325

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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VERN WEBER,
Appellant

v.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT Et Al.,
Appellants

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Appellant's petition for review DENIED.

Kennard, J. is of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Officials Appellate Reports the opinion in the above-entitled appeal filed December 7, 1993, which appears at 20 Cal.App.4th 1054. (Cal. Const., Art. VI, section 14, rule 976, Cal. Rules of Court.)

Lucas
Chief Justice

**Appendix 3**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

VERN WEBER,
Plaintiff,

vs.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, WILLIAM A. STRESHLY, JAMES C. O'CONNOR, and DOES 1 through 30,
Defendants.

NO. C90-03341

DECISION RE: ATTORNEY FEES

Plaintiff prevailed against defendants in his Civil Rights action and now seeks an award for reasonable attorney's fees pursuant to 42 U.S.C. 1988.

The motion was timely filed and heard December 3, 1991 and submitted upon the argument of counsel as well as the memoranda, declarations and authorities filed herein, all of which have been read and examined. A post hearing memorandum filed on behalf of plaintiff has also been considered.

This action arose out of plaintiff's employment with defendant San Ramon Unified School District (hereafter designated as "District"), which was had under a written agreement expiring December 31, 1989. The employment covered a number of years and he held the position of Director, Management Services, at an annual salary of $75,000.00. His principal duties were to undertake demographic studies and he testified he ranked among the most qualified engaged in such activity within the school districts

of this state. During the Spring of 1989 he was unsuccessful in his quest for appointment as Assistant Superintendant of the District.

Later in the same year, plaintiff and staff negotiated an agreement to be effective January 1, 1990 for his services as a consultant for a period of two years during which he would provide 1,000 hours of services. This agreement required the acceptance of the District Board.

On October 24, 1989, a local newspaper published an article quoting criticism which plaintiff had expressed with respect to the management and administration of the District. On November 9, 1989, plaintiff was informed the Board had not approved the agreement and terminated his position as of December 31, 1989.

The jury in its Special Verdict found that "the defendants' decision to lay off the plaintiff (was) substantially motivated by plaintiff's statement to the press of public concern."

Damages were awarded against all defendants in the sum of $388,600.00 and an additional award for punitive damages in the amount of $7,500.00 was had against defendant William A. Streshly. This resulted in a total award of $396,100.00.

The plaintiff and his counsel had entered into a 40% contingency fee agreement which amounts to $158,440.00.

In cases of this nature, a contingent fee agreement is not controlling, yet it is a factor to be considered in determining a reasonable fee.

The findings hereafter made take into account the factors to be employed as guidelines in arriving at a reasonable fee as prescribed in *Kerr v. Extras Guild, Inc.* 526 Fed.2d 67.

The complaint, which was filed July 1990, contained fifteen (15) causes of action of which thirteen (13) were

dismissed upon two motions for summary adjudication of issues. Among the issues dismissed, and unrelated to the issues tried before the jury, were causes based on contracts and tortious conduct.

Counsel for defendants properly seeks reduction in plaintiff's fees applicable to counsels' resistance of the two motions. He estimated one-half of the total hours claimed by plaintiff's counsel were devoted to these motions. Lead counsel for plaintiff in his declaration acknowledged "... one of the major expenses of time in this case was in opposing the two separate adjudication motions filed by defendants."

Neither counsel, however, provided the Court with particulars as to the hours applicable to these motions, nor does evidence in any instance provide the hours for a given category of activity of the members of plaintiff's counsel. This made it necessary for the Court to examine in detail the computer records for the nature of the services and the hours associated therewith for each of the six individuals rendering services.

GEOFFREY FAUST

Geoffrey Faust was lead counsel and credits himself with 582.70 hours from which 30 hours (5%) is deducted for time relating to the motions for summary adjudication of issues, resulting in a net of 552.70 hours.

His basic hourly charge during the entire period he represented plaintiff was $190.00. His successful undertaking of the matter entitled him to a lodestar fee of $225.00 per hour which is within the market range for such services. The reasonable fee for his services is $124,357.50.

LISA SMITH

Lisa Smith was an associate counsel and was present at counsel table during most of the trial but she did not

participate in any of the oral proceedings. She had just entered her second year of practice when the action was filed. No declaration is provided with respect to any earlier trial experience. The declaration of lead counsel dated November 7, 1991 (Exhibit D) describes the nature of her services but no evidence is provided therein of her qualifications. Therefore, the benefit derived from her activity with respect to items 3, 4, 7 and 8 of Exhibit D cannot be determined. As for the services dealing with "workers' comp exclusive remedy," "management vs. non-management employees" and research re summary adjudication issues, they do not relate to the issues tried.

Lisa Smith is credited with 307.40 hours, from which 46 hours (15%) is deducted for a net of 261.40 hours.

The basic charge for her services is $110.00 which the Court finds reasonable, but her services do not qualify for a lodestar rate. Accordingly, $28,754.00 is deemed a reasonable award for her services.

JEFFREY KIRSCHENBAUM

Jeffrey Kirschenbaum reports 17.5 hours of legal services at a rate of $110.00 per hour. One entry reporting his services reads, "Revised brief re first amendment issues; attended trial — 9 hours." This covered the sixth day of trial at which four members of the firm representing plaintiff were present. There is no evidence to justify the presence of this individual. Accordingly, his chargeable time is reduced to 8.50 hours, for a reasonable charge of $953.00. His services do not merit a lodestar rate.

RICHARD INSALSCO

Richard Insalsco performed 11.70 hours of legal services at a basic rate of $115 per hour which is reasonable but not entitled to a lodestar rate. The sum awarded for his services is $1,345.50.

## DAVID DUNBAR

David Dunbar, a legal assistant, credits himself with 267.90 hours of which 104 hours are attributed to his presence during the trial over a period of ten days. During several of these days he credits himself with 11 to 13 hours which includes not less than 2 hours daily travel time to and from the court. His services included the assembly of exhibits which had been accomplished and marked prior to trial. His presence at the trial amounted to overstaffing and the limited duties assigned to him could have been assumed by Lisa Smith. There were occasions when Lisa Smith was absent from the courtroom, during which time plaintiff occupied her chair, assisting lead counsel with exhibits. The basic hourly charge of $95 for this legal assistant is reasonable. His hours are reduced by 84, leaving a net of 184, resulting in a charge of $17,480.00 for his services. His services do not qualify for a lodestar rate.

## KAREN NEUSTEIN

Karen Neustein, a legal assistant, reports 55.50 hours at a basic hourly rate of $75.00. The hours and rate are reasonable and result in a charge of $4,162.50. Her services do not merit a lodestar rate.

## WORDPROCESSORS/STENOGRAPHERS

The hours reported for this activity is recorded monthly as a single figure with no particulars of the work product. Allowance for such services is denied as it is an essential function of a law office and should be charged to overhead.

The request of plaintiff's counsel for an enhancement or multiplier of the foregoing charges is denied. Plaintiff's case was not of an exceptional nature to qualify for such. It involved no new or novel issue. Counsel had a sophisticated client, fully informed of all aspects of District administration. The principal issue presented to the jury was whether the published statements of plaintiff reported by the press

substantially motivated termination of his services. There was no issue over the content of the news article.

Plaintiff is awarded reasonable attorneys fees in the sum of $177,034.50.

Counsel for plaintiff to prepare form of Judgment and present same to opposing counsel for his approval as to form.

DATED: December 19, 1991

JAY PFOTENHAUER
Judge of the Superior Court

## Appendix 4

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances.

### AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. 14. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

### AMENDMENT XIV

### SECTION I

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

## 42 U.S.C. SECTION 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## Appendix 5

Reprinted from the *San Ramon Valley Times*,
June 30, 1989

### "STRESHLY CITED FOR DEFICIT"

Facilities director says funds were overestimated

By Kate Hwangbo
Staff Writer

DANVILLE — The school district is battling a $603,000 deficit this year because Superintendant Bill Streshly intentionally overestimated the amount of money that would be available from the state, the district's top school planner has charged.

Facilities Director Vern Weber said Streshly told him to increase estimates of the student population — on which state funding is based — by 105. On paper, the action added $289,380 to the district budget in August 1988.

But when the students didn't materialize, neither did the additional money. The mistake generated half of the $603,000 deficit the district faces today, Weber charged.

Budget officials will reconsider student population this summer as they plan for 1988-89.

Streshly admitted intentionally overestimating the student population, but said he did it because he felt other sources of state income, such as lottery money, had been underestimated. He said he couldn't increase the lottery figure because he is required to document its basis to the county Office of Education.

But the attendance figure wasn't subject to the same documentation requirements.

As it turns out, Streshly's low estimate of the lottery money did balance his overestimate of student population. When the final figures were totaled, the district received

$402,680 more than it had anticipated from the state lottery, but $330,720 less than expected in student-population-based funds.

The superintendant said the deficit was not caused by overestimating student population, but because Budget Director Tom Reid forgot to put aside money to pay teachers an extra $660,658. Reid probably forgot because the raise was negotiated the previous year, Streshly said.

School board members said they were not concerned by Streshly's decision.

"He's the manager," said Board President Jo Anne Erickson. "He has to manage the way he feels comfortable. . . . One way or another it's a no-win situation." Erickson said when a surplus turned up, teachers would claim they could have gotten a higher salary increase.

Board Member Judy Locker called estimating student population "one of the world's biggest crapshoots anyway. It's an extremely difficult science."

But officials of other districts disagreed with Streshly's methods.

"The man would have to have a crystal ball" to count on lottery money to make up other losses, said Fred Basalto, top financial officer of the Richmond Unified School District. "Unless you have a fund that you're sure of, that's not kosher."

"It's not a legitimate thing to do," said Pat Keegan, top financial officer of the state Department of Public Instruction. "Your (population) estimate, which drives your revenue, should be based on your best view of the world."

"We have really tried to be straight," said Paul Allen, an associate superintendant of the Mt. Diablo Unified School District. "If we get enrollment projections and feel the

projection is high, we might drop it, but we'd never inflate it."

Allen said he could not recall ever inflating the projected enrollment in 29 years with his school district.

"It's more of a gamble than I'd be willing to take," said Antioch Unified School District Superintendant Allan Newall.

However, John Hendrickson, assistant superintendant of business services for the county Office of Education, said Streshly did not appear to have done anything inappropriate because his enrollment projection hike was relatively small.

But he added, "Each revenue assumption should stand on its own merits."

In August 1988, Weber predicted there would be 15,305 students that fall.

After discussions with his assistants, Streshly decided to raise that to 15,410 pupils so the district's revenues would appear to cover its expenses on the budget, Weber said.

The real attendance figure was 15,290, leaving the district 120 students short. At $2,756 per student from the state, the district had budgeted $330,720 more than it received. In 1988-89, enrollment-driven revenue came to $42.5 million, 79 percent of the district's $53.4 million budget.

The superintendant described his decision this way: The state gives the district several kinds of income, including money based on enrollment. Because he sensed the district had underestimated other kinds of state income — such as from the lottery or for specialized programs — Streshly said he increased the estimate of enrollment income to compensate.

Enrollment figures are easier to manipulate, budget director Tom Reid said, because the district doesn't have to

defend them to outside agencies, and because they allow for timely adjustments to the budget.

But Basalto of the Richmond district remained unconvinced.

"It seems to me he should have been more direct and raised his assumption for lottery," he said.

**Appendix 6**

Reprinted from the *San Ramon Valley Times*,
October 24, 1989

## "WEBER SAYS HE WAS FORCED FROM DISTRICT JOB"

SRV's management services director to leave post at end of month

by Kate Hwangbo
Staff Writer

DANVILLE — Management services director Vern Weber said Monday that he was forced from his job with the San Ramon Valley school district. The district announced last week that Weber will leave at the end of the month.

Weber said Assistant Superintendant Jim O'Connor asked for his resignation soon after Weber publicly accused Superintendant Bill Streshly in June of inflating expected state revenue to balance the district's budget.

Weber, who will continue as a district consultant, said no one ever told him why he was being let go. He said he was asked to sign a gag document agreeing not to talk about the conditions of his release, which he refused to do.

O'Connor denied that he asked Weber to resign, or that he asked him to sign a gag order. He said he told Weber in May about a staff reorganization and gave him three options. O'Connor and Streshly said those options were to apply for a job that Weber wasn't assured of, take another job that entailed a pay cut or become a consultant. O'Connor said Weber chose the third.

"I have serious concerns for the welfare of the school district," said Weber. "With my leaving there is no one in management that has my expertise" in school planning.

"We're not going to let anything happen to the facilities department," said Streshly. "I think we have the expertise. Those are not highly specialized areas." School building director Don Orr began work in August after leaving his job as senior city planner for San Ramon. Before this summer, Weber and former deputy superintendant Jim Solberg ran a successful school building program that found money to build and maintain schools, while other school districts struggled with year-round schools and run-down facilities.

The program's successes included finding funds for the $10.7 million California High School expansion, the $11.8 million new Charlotte Wood Intermediate School and the $1.7 million new Del Amigo High School.

Weber said he was looking forward to working with Solberg in their new consulting company, Golden State Planning Group, which will advise school districts on how to get money from the state to build schools. Weber said he will also be a real estate broker.

Weber was one of three administrators who have publicly criticized Streshly. The others were Solberg and former business manager, Jim Tanner. Both retired last summer, after complaining of diminished roles in the district. In the past year, Weber took on Streshly over the budget deficit, and management morale.

Although Weber is leaving at the end of this month, he remains an employee until Dec. 31 because of accumulated vacation time.

**Appendix 7**

GOLDEN STATE PLANNING GROUP
383 Diablo Road, Suite 100
Danville, CA 94526
415 - 743-0499

Principal Consultants

James R. Solberg, Ph.D.
Vern Weber

November 6, 1989

Dr. William A. Streshly, Superintendant
San Ramon Valley Unified School District
699 Old Orchard Drive
Danville, CA 94526

Dear Bill:

I could not have been more surprised when I received your letter of November 1, as it is my understanding that everything is agreed to and finalized. I'm sure that my explanation of the facts will clarify the issues you raised.

It may be a technical point, but I did not resign my position; I announced my retirement — contingent upon the approval of specific conditions. Those conditions were approved, as I have signed copies of all documents, and my retirement letter is therefore valid and legal. As a retiree I am eligible to continue my benefit package, which I intend to do at my expense until I turn 55, when the District will continue to provide the benefits at its cost. There will therefore be no hiatus in coverage as you indicated.

My consultant contract is effective January 1, 1990, coinciding with the first day of my retirement. That contract is for my services through Golden State Planning Group, of which I am a part. It was your attorney, Sandra Wolliver, who suggested that Gary Gibbs' name be added to the contract since, at that time, Golden State was in his name as an

individual. In an October 19 memo to Jim O'Connor I explained that Gary would rather not sign the contract because of a possible conflict of interest, and stated that Golden State would be incorporated by me prior to January 1 and that my name could be added to the Fictitious Business Name Statement in the meantime if there was a problem. Jim told me to forget about Gary's signature as it wasn't necessary.

All this is a rather moot point now, however, since with Gary's decision to disassociate himself from Golden State Planning Group, he abandoned the use of the name of November 1, and I immediately placed it in my name (copies attached). I am therefore the sole owner, and my signature on the contract alone is valid and legal. I also have the name reserved at the State and still intend to incorporate before January 1, when my contract with the District takes effect.

I fail to see any contradiction between the joint press release we signed and the article that appeared in the San Ramon Valley Times on October 24. Everything that we said in the press release was and is true. While I feel that the article that appeared in the paper was a distortion of the interview I had, I did not criticize the District or anyone connected with the District. The article included many statements and items that did not come from me, but the material that did come from me is true. I would have preferred to see a more positive article, as I feel very positive about the shift from being an employee to being a consultant, but I will not lie to the press in response to a direct question. There were many positive things that I asked Kay to print, which she did not include, but I know no way to direct the press in the inclusion or exclusion of news items in an article or its headline, especially material drawn from other sources. I prepared a response to the Times on the article after it appeared in print, but upon reflection I decided to let things

go and to put my energy into proceeding on a direct positive note rather than risk stirring the pot. Thus my November 1 letter to the Board of Education and you. I offer you my comments on the article in way of explanation, but it should also be understood that my public comments in no way relate to the terms of my retirement or contract.

Bill, I hope that this letter and material resolve the issues you raised to your satisfaction. I truly hope that we can look toward the future and not the past for our own peace of mind as well as to enable us to get on with the critical work which lies ahead.

Sincerely,

Vern Weber

cc: Jim O'Connor
Mike Halloran